

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

WALDEN FAMILY PLAYHOUSE, LLC,

Employer,

and

Case 27-RC-8288

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, LOCAL #7,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On October 24, 2003, International Alliance of Theatrical Stage Employees, Local #7 (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act, as amended (the Act) seeking to represent “all full-time and regular part-time stage employees and engineers employed by Walden Family Playhouse (Employer) in Colorado, excluding production managers, supervisors as defined by the Act, guards and office clericals.”

On November 4, 2003, a hearing was held before a hearing officer of the National Labor Relations Board. The issues presented include the following:

1. Whether the sound engineer shares a sufficient community of interest with the four stagehands stipulated to be in the bargaining unit to warrant his inclusion in the unit.

2. Whether the wardrobe supervisor, a nonsupervisory position within the meaning of Section 2(11) of the Act, shares a sufficient community of interest with the stagehands to warrant her inclusion in the unit.
3. Whether two individuals employed by the Employer as stagehands when additional help is needed should be included in the unit as regular part-time employees or excluded as casuals.

The Petitioner contends that both the sound engineer and the wardrobe supervisor share a sufficient community of interest with the stage employees to warrant their inclusion in the petitioned for unit. The Petitioner further contends that the two individuals who work on an “as needed” basis are regular part-time employees who should be included in the unit. Conversely the Employer takes the position that both the sound engineer and the wardrobe supervisor do not share a community of interest with the four full-time stagehands and should, therefore, be excluded from the unit. With regard to the two individuals who are employed as needed, the Employer submits that they should be excluded as casual employees who have no reasonable expectation of future employment beyond the current show for which they may be called to work. As discussed below, I conclude that the sound engineer and the wardrobe supervisor share a community of interest with the four stagehands sufficient to warrant their inclusion in the unit. I further conclude that the two individuals employed on an “as needed” basis have worked with sufficient regularity to support a finding that they should be included in the unit as regular part-time or on-call employees.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it is subject to the jurisdiction of the Board. The parties stipulated, and I find, that the Employer, a limited partnership organized in the State of Delaware, is a producer of children's theater in Denver, Colorado. During its first nine months of operation the Employer's total sales amounted to \$408,000. It is estimated that on a projected basis total sales for its first year of operation will be in excess of \$500,000. Marston Corp., 120 NLRB 76 (1976). During its first nine months of operation, the Employer purchased and received at its Colorado facility goods and services valued in excess of \$5,000 from suppliers located outside the State of Colorado.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
5. It is appropriate to direct an election in the following unit: all full-time and regular part-time stage employees, including the sound engineer and the wardrobe supervisor employed by Walden Family Playhouse in Colorado; excluding production managers, office clerical employees, guards and supervisors as defined in the Act.

STATEMENT OF THE CASE

I Background

The Employer is involved in presenting on-stage performances for children. The Employer's productions are presented at a theater that is part of a complex of United Artists Theaters located at the Colorado Mills Shopping Mall in Lakewood, Colorado. The Employer began producing shows in Colorado in 2003 and has presented five shows as of the date of the hearing. The Employer is currently in the midst of a 40-week season running from September 2003 until May 2004. During the current season, each show will run seven weeks and there will be a two to three week hiatus between productions.

The theater used by the Employer has four rooms to the left of the stage. These rooms include a wardrobe room, a prop room, an electrical room and a "green room." This latter room houses a couch, refrigerator, coffee machine, and other conveniences. A control booth used by both the sound engineer and the stagehand that handles lighting is located on the second floor.

The Employer's administrative offices are housed in a facility located several minutes away from the theater. Douglas Love is the producing artistic director, and he is in overall charge of the Employer. Robin Mathiesen is the general manager and executive in charge of production. She reports to Love. Also located at the administrative offices are the director of development, director of educational outreach, marketing people, and the company manager. In addition to the petitioned-for employees, a house manager, a box office manager, three box office assistants and two to four ushers are also employed at the theater.

The four stagehands stipulated to be in the bargaining unit report to the technical director who is directly under Mathiesen. The current technical director is Brian Shippey. Each of the stagehands earns \$400 per week. The four stagehands reporting to Shippey include Carl Costick, the audio assistant; Kelly Giordano, the electrical person in charge of the lighting; Ben Downing, the deck crew chief, and Lindsey Keller, the props chief. The two individuals who are called in as needed to perform stagehand work are Greg Melton and Kevin Lengyel. Shippey decides when to call in Melton and Lengyel, and they report to him. The sound engineer is John Rivera and the wardrobe supervisor is Ashley Burns. They each report to Mathiesen.

The Employer has the scenery and props for each new production shipped to its theater. The stagehands unload the scenery and props from trucks and assemble the scenery at the theater. This process is called “load in”. Each stage employee has a specific area of responsibility, as indicated by his or her title. Downing oversees the assembly of the scenery. Keller is in charge of the props, which are stored in the props room. Giordana is responsible for setting up the lighting, while Costick works on the audio set-up on the stage.

The term “tech week” refers to the eight days before a new production begins. This time period is used to ensure that everything is set for the opening of the new play. During this time, there are dress rehearsals, final costume fittings, sound checks and other final preparations.

At the conclusion of the production, the scenery, props and other items specific to the production are packed up by the stage employees in preparation for being shipped out by the suppliers. This work is referred to as “load out.”

II Eligibility of Melton and Lengyel

Melton and Lengyel have been employed by the Employer primarily to work along with the full-time stagehands on load-ins and load-outs. In that capacity, they perform the same job functions under the same working conditions, as do the regular full-time stagehands with whom they are assigned to work. Lengyel and Melton are paid an hourly rate to perform this work alongside the full-time stage crew. The record does not contain the hourly wage rate that they receive. Lengyel also assists Giordana in setting up the lighting for new shows, and he has worked on a tech week. Melton has worked at least some hours in every month from March through September with the exception of July. Lengyel has worked some hours in every month from April through September with the exception of July. These hours reflect the pattern of their being called in by the technical director when the new scenery and other material has been delivered and load in is set to commence for a new production and at the conclusion of each production when load out is set to commence. Both Melton and Lengyel have worked for at least one day at the start and end of four of the five productions produced by the Employer.

In determining the unit placement of on call or casual employees, the Board assesses whether such employees may be considered regular part-time employees depending on the specific nature of their employment. When employees are sporadically employed with no established pattern of regular continuing employment, such employees are excluded from the unit. Piggly Wiggly El Dorado Co., 154 NLRB 445, 451 (1965). However, when employees have a substantial working history, with a

substantial probability of future employment and regular work, they are considered regular part-time employees warranting inclusion in the unit. Davison-Paxon Co., 185 NLRB 21 (1970).

The Board has crafted different formulas for different industries in determining whether an individual has worked a sufficient number of hours over a long enough period of time to establish a pattern of regular employment. In Medion, Inc., 200 NLRB 1033 (1972), the Board formulated a test for theater production employees providing that such production employees were considered eligible voters if they worked two productions for a minimum of five days over the period of one year. In Julliard School, 208 NLRB 153 (1974), the Board modified the formula to also include employees who had worked at least 15 days over a two year period. As noted above, since each was first hired in the spring of 2003, both Melton and Lengyel have worked alongside stagehands for at least one day at the start and end of four of the five productions produced by the Employer. Their history of employment satisfies the formulas devised in Medion and Julliard for inclusion in a bargaining unit. See also, DIC Entertainment, L.P., 328 NLRB 660 (1990).

The Employer's contention that neither Lengyel nor Melton works sufficient hours to be included in the unit relies on the formula used by the Regional Director and approved of by the Board in Trump Taj Mahal Casino, 306 NLRB 294 (1992). Although it is true that the hours worked by Lengyel and Melton do not meet the criteria used in Trump Taj Mahal, I find that their hours worked establish a consistent history of employment and a reasonable expectation of future employment so as to meet the Board's test for classification as a regular part-time employee. The Board's decision in Trump Taj Mahal does not require a different outcome. The stagehands at issue in Trump Taj Mahal were found to be included in the appropriate bargaining unit based on facts where they worked more hours than the part-time employees at issue here. But that case does not stand for the proposition that

stagehands who work fewer hours are not also properly included in the unit. In fact, the Board in Trump Taj Mahal noted with approval the formulas used in Julliard School and in Medion in stating, “...the Board has been flexible in carrying out its responsibility to devise formulas suited to unique conditions in the entertainment industry...to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation.” Trump Taj Mahal, supra at 296.

The Employer also raised issues concerning these individuals having other employment and the ability to refuse work offered to them by the Employer. In this regard, the Employer noted that Lengyel has been offered a full-time stagehand position by the Employer but declined the offer, due to his preference for working on this on-call basis. Contrary to the Employer’s position, the Board has made it clear that the focus in determining whether an employee is a casual or a regular part-time employee is the regularity of employment and the similarity of work duties with unit employees. Neither the ability to reject work nor the fact that the part-time employee may have regular employment elsewhere is determinative of his employment status. Tri-State Transportation, Co., 289 NLRB 356, 357 (1988). Upon the foregoing, I find that Melton and Lengyel should be included in the bargaining unit as regular part-time employees and shall be eligible to vote in the election directed herein.

III The Sound Engineer

The sound engineer is John Rivera. He reports to Mathiesen, rather than to the technical director. Rivera works with the producing artistic director and the director to create a music tape for the show. During tech week, Rivera modifies the sound cues and microphone volumes and checks the music tapes. The sound engineer sits in the control booth during the shows. He does not generally work on load-in or load-out. Rivera works with stagehand Carl Costick, who is the audio assistant, in

placement of the microphones on the actors and on the stage. Rivera also works with the stagehands on the placement of speakers on the stage. During the shows, Rivera sits near stagehand Kelly Giordano who is responsible for the lighting during the shows. The sound engineer earns a salary of \$450 per week, as compared to the \$400 per week salary of the stagehands. None of the employees receive any fringe benefits such as health benefits or vacation time. While the stagehands work an 8 a.m. to 4 p.m. schedule, Rivera works the hours necessary to perform his duties. As noted, Rivera works during the actual productions, as do all of the stagehands. Rivera submits a timecard to the administrative office to record his hours just as the stagehands do.

To decide if there is a community of interest among different groups of employees, the Board may consider several factors including the degree of integration of their work functions, the frequency of their contact, and the nature of their supervision. See Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962). Consideration of such factors in the case at hand demonstrates the existence of a community of interest between the stagehands and the sound engineer.

The record shows a high degree of integration between the work functions of the stagehands and the sound engineer. While some of the stagehands set up the scenery and props for the actors, another is responsible for the lighting and the sound engineer is responsible for the audio portion of the shows. Each of these tasks must be performed to ensure a successful overall production. Stagehand Carl Costick works closely with sound engineer Rivera to make certain that the sound is coordinated from the sound booth to the stage. During the show, stagehand Giordano shares the booth with Rivera. She controls the lighting on stage as Rivera controls the sound. The audio and visual aspects of the production must mesh together for the show to be successful.

While Rivera does not report to the technical director, as do the stagehands, they all ultimately share common direction from the executive in charge of production. Moreover, there is no other group of employees with which the sound engineer would share a closer community of interest were he to be excluded from the stage employees bargaining unit. Roman Catholic Orphan Asylum, 229 NLRB 251 (1977).

IV The Wardrobe Supervisor

Wardrobe supervisor Ashley Burns is responsible for preparing the costumes for the actors and for performing any necessary repair work on costumes. The wardrobe supervisor generally receives the costumes from the costume designer and then organizes and arranges the costumes before storing them in the wardrobe room. The costumes are not delivered as part of the load in, rather they are delivered separately. The wardrobe supervisor may do some purchasing of clothing and accessories at the direction of the costume designer. Since Burns happens to also be an artist, she does some minor painting of scenery.

During the actual presentation of each show, the wardrobe supervisor helps the actors make quick changes, some of which take place in the wardrobe room. She works with the audio assistant in placing microphones on the actors. She also performs repairs on costumes using a sewing machine located in the wardrobe room.

The wardrobe supervisor receives the same weekly salary of \$400 that is received by the stagehands. Burns submits a timecard to record her hours worked. She reports to the general manager Mathiesen and to the costume designer. There is a different costume designer for each show. Depending on the costume designer, Burns has input into the creation of the costumes. This input

appears to be on an occasional basis. The wardrobe supervisor's work hours fluctuate from the 8 a.m. to 4 p.m. schedule worked by the stagehands. Like Rivera, Burns works during the actual productions, as do all of the stagehands.

I find that the wardrobe supervisor shares a sufficient community of interest with the stage employees to warrant her inclusion in the bargaining unit. Burns' duties in putting together the costumes and readying them for the actors to wear during the shows is akin to the props mistress, Lindsey Keller, preparing the props to be used by the actors. While the Employer contends that Burns is involved in the artistic side of the production, unlike the stagehands, Burns' role in the actual design of costumes is minimal compared to her other duties. The costume designer is primarily responsible for the design of the costumes. During the performance of each show, Burns is present in the stage area, as are the stage employees with the exception of Giordano, who sits in the booth. Burns also works with Costick, who the parties have stipulated to be in the appropriate unit, in attaching microphones to the actors. While Burns does not report to the technical director, all the employees at issue share the ultimate supervision of the executive in charge of production. Moreover, as with the sound engineer, there is no other group of employees with whom the wardrobe supervisor shares a closer community of interest.

Direction of Election

An election by secret ballot shall be conducted by the Undersigned among the employees in the unit found appropriate at the time and place set for in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.¹ Eligible to vote are those in the Unit as described above

¹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE

EMPLOYEES, LOCAL NO. 7

List of Voters

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before **December 2, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. The Board in Washington must receive this request by **December 9, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional

Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 25th day of November 2003.

B. Allan Benson, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Plaza
Denver, Colorado 80202-5433

460-5067-7700
460-5067-8200
420-2900